

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Steven Minn,

Complainant,

vs.

Keith Downey and Downey for House  
Exploratory Committee,

Respondents.

**NOTICE OF DETERMINATION OF  
PRIMA FACIE VIOLATION  
AND  
NOTICE OF AND ORDER FOR  
EVIDENTIARY HEARING**

**TO: Steven Minn, 7 Overholt Pass, Edina, MN 55439; and Keith Downey, Downey for House Exploratory Committee, 5200 Wilson Road, Suite 150, Edina, MN 55424.**

On January 17, 2008, Steven Minn filed a Complaint with the Office of Administrative Hearings alleging that Keith Downey and the Downey for House Exploratory Committee, violated Minnesota Statutes §§ 211B.02 and 211B.06 by falsely implying that Mr. Downey is the incumbent and that he has the Republican Party endorsement for the House 41A district seat. After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of Minnesota Statutes § 211B.02, but does not set forth a prima facie violation of § 211B.06. This determination is described in more detail in the attached Memorandum.

**THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN** that this matter will be scheduled for a prehearing conference and evidentiary hearing to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101, before three Administrative Law Judges. The evidentiary hearing must be held within 90 days of the date the complaint was filed, pursuant to Minn. Stat. § 211B.35. You will be notified of the date and time of the prehearing conference and evidentiary hearing, and the three judges assigned to it, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at [www.oah.state.mn.us](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judge and opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55101, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: January 18, 2008

/s/ Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

## **MEMORANDUM**

The Respondent, Keith Downey, is a candidate for the Minnesota House 41A district seat in the November 2008 election.<sup>1</sup> He does not have the endorsement of the Republican Party and he is not the incumbent. (Ron Erhardt, a Republican, is the current State Representative for District 41A.) On September 10, 2007, Mr. Downey and/or the Downey for House Exploratory Committee distributed a campaign brochure promoting Mr. Downey's candidacy. The brochure was prepared and paid for by the Downey for House Exploratory Committee. On the first page of the brochure the following phrases appear next to a picture of Mr. Downey:

Vote Keith Downey  
Republican Endorsement for State Representative

Similarly, the following phrases appear next to a picture of Mr. Downey on the inside fold of the brochure (page 5):

Vote Keith Downey  
Republican Endorsement!

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<sup>1</sup> Minnesota House District 41A consists of portions of the city of Edina.

The Complaint alleges that by using the phrase “Republican Endorsement,” the Respondent has knowingly violated Minn. Stat. §§ 211B.02 and 211B.06 by falsely implying he is the incumbent and that he has the Republican Party endorsement.

Minn. Stat. § 211B.02 provides in relevant part as follows:

**211B.02 False Claim of Support.**

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party unit or of an organization.

The issue arising under 211B.02 in this case is whether, by using the phrase “Republican Endorsement” on the campaign brochure, the Respondents knowingly falsely implied that Mr. Downey has the endorsement of the Republican Party of Minnesota. In *Schmitt v. McLaughlin*,<sup>2</sup> the Minnesota Supreme Court held that a candidate’s use of the initials “DFL” would imply to the average voter that the candidate had the endorsement, or, at the very least, the support of the DFL party. To hold otherwise, according to the court, would render the word “imply” meaningless.<sup>3</sup> Accordingly, a false implication of support or endorsement is as much a violation as an overtly false claim.

The Administrative Law Judge concludes that the complaint does allege sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.02 as against both Respondents. If the evidence at a hearing were to establish that the Respondents knowingly made the claim “Republican Endorsement” to falsely imply that the Republican Party of Minnesota endorses Mr. Downey’s candidacy, that would be a violation of Minn. Stat. § 211B.02. This claim will proceed to a prehearing conference and will be scheduled for a hearing before a panel of three Administrative Law Judges.

The Complaint also alleges that Respondents violated Minn. Stat. § 211B.06 by falsely implying that Mr. Downey is the incumbent candidate and that he has the endorsement of the Republican Party of Minnesota.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

This statute prohibits a person from intentionally preparing or disseminating false campaign material that the person knows is false or communicates to others with

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<sup>2</sup> 275 N.W.2d 587 (Minn. 1979).

<sup>3</sup> 275 N.W.2d at 591.

reckless disregard of whether it is false. The Minnesota Supreme Court has observed that this statute is “directed against the evil of making false statements of fact.”<sup>4</sup> It does not prohibit inferences or implications, even if misleading. The phrase “Republican Endorsement” is not a false statement of fact. It is arguably a false implication of party endorsement, but implications do not come within the purview of Section 211B.06. Likewise, the campaign brochure does not contain any factually false statements with respect to Mr. Downey being the incumbent. Instead, several statements in the campaign material, such as “Time for a Change!” and “It is time for a change in 41A, and we now have a choice,” make it clear that Mr. Downey is not the incumbent. The Administrative Law Judge concludes that the allegations in the complaint are not sufficient to state a prima facie violation of Minn. Stat. § 211B.06. The allegation that Respondents violated Minn. Stat. § 211B.06 is therefore dismissed.

Pursuant to Minnesota Statutes § 211B.33, subd. 2(d), this matter shall be set on for an evidentiary hearing before a panel of three administrative law judges to consider the false claim of endorsement allegation made under 211B.02. An order scheduling this matter for a telephone prehearing conference and an evidentiary hearing will be issued shortly.

B.L.N.

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<sup>4</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).